



The Marijuana on the High Seas Act: Extending U.S. Jurisdiction Beyond International Limits

Samuel S. Lewis†

Drug smuggling into the United States has grown to epidemic proportions during the last decade.¹ The primary avenue for drug shipment is the high seas.² To preserve comity among nations, U.S. courts

† J.D. Candidate, University of Florida.

1. The Drug Enforcement Administration (DEA) estimates that drug trafficking is a \$64 billion industry. *See* THE NATIONAL NARCOTICS INTELLIGENCE CONSUMERS COMMITTEE, NARCOTICS INTELLIGENCE ESTIMATE 5 (1979) [hereinafter NARCOTICS ESTIMATE]. More than 33 million pounds of marijuana alone are illegally imported each year, and DEA data indicate that drug smuggling into the country is increasing sharply. *See id.* at 31. Illegal drugs in the United States generated \$64 billion in retail sales in 1979, compared to \$50 billion in 1978 and \$48 billion in 1977. Domestic production, however, accounted for only 25% of the total retail sales in 1979, the same proportion as in 1978, reflecting the increase in total drug importation. *Id.* at 5.

Due to the heavy flow of cocaine and marijuana from South America, Florida is the prime smuggling gateway to the United States. Approximately 40% of all the cocaine and 30% of all the marijuana imported move through that state each year, representing an estimated retail value of \$25 billion. *Id.* at 10. Some publications put the Florida figures even higher. *Time Magazine* estimates that 70% of all marijuana and cocaine imported into the United States passes through South Florida, making drug smuggling the region's major industry. Kelly, *Trouble in Paradise*, *TIME*, Nov. 23, 1981, at 22, 22-23.

About 75% of the U.S. market supply of marijuana originates in Colombia. *See* NARCOTICS ESTIMATE, *supra*, at 31. *See also infra* notes 24-27 and accompanying text.

The statistics used in this paper on the supply of drugs to the United States are taken primarily from the Narcotics Intelligence Estimate (NIE), produced annually by the National Narcotics Intelligence Consumers Committee (NNICC). The NNICC was established in 1978 to coordinate foreign and domestic narcotics intelligence at the federal level. The present membership of the NNICC is as follows: United States Coast Guard; United States Customs Service; Drug Enforcement Administration; Federal Bureau of Investigation; Immigration and Naturalization Service; Internal Revenue Service; National Institute on Drug Abuse; Department of State; Department of the Treasury; White House. The NIE is the most comprehensive and authoritative estimate available on the supply of illicit drugs to the United States. Because drug trafficking is an illegal activity, there are few "hard" statistics. Interview with Cornelius J. Dougherty, Public Information Officer for the Drug Enforcement Administration, in Miami (June 20, 1982).

2. The high seas include all waters beyond the territorial seas of the United States and beyond the territorial sea of any foreign nation. *See* 21 U.S.C. § 955b(b) (Supp. IV 1980); *United States v. Louisiana*, 394 U.S. 11, 22 (1969); *United States v. Postal*, 589 F.2d 862, 868 (5th Cir. 1979). The extent of a nation's territorial boundaries is restricted by the international law of the sea, which was to a large degree codified by the United Nations conference at Geneva in 1958. The Conference produced four conventions: Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. 5200, 450 U.N.T.S. 82 (entered into force for the United States Sept. 30, 1962); Convention on the Territorial Sea and Contiguous Zone, April 29, 1958, 15 U.S.T. 1606, T.I.A.S. 5639, 516 U.N.T.S. 205 (entered into force for the

seek to abide by principles of international law³ to obtain jurisdiction over acts of trafficking committed aboard U.S.,⁴ stateless,⁵ and foreign vessels⁶ on the open seas. In the past, courts generally were able to

United States Sept. 10, 1964); Convention on the Continental Shelf, April 29, 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311 (entered into force for the United States June 10, 1964); Convention on Fishing and Conservation of Living Resources of the High Seas, April 29, 1958, 17 U.S.T. 139, T.I.A.S. 5969, 599 U.N.T.S. 285 (entered into force for the United States Mar. 20, 1966). For a further discussion of the Conventions, see M. AKEHURST, *A MODERN INTRODUCTION TO INTERNATIONAL LAW* 161 (3d ed. 1977). In accordance with these conventions, international law divides the navigable sea into three general zones—internal waters, territorial sea, and high seas. Each zone is distinguished by the degree of control the contiguous nation may exercise over it. Internal waters, such as rivers, lakes, and canals, are within the land area of a nation and are subject to that nation's complete sovereignty, as if they were part of the land. Beyond the seaward edge of a country lies the territorial sea, in which a nation may exercise plenary authority but cannot deny the right of innocent passage to foreign vessels. Although the territorial sea was defined in Article 6 of the Convention on the Territorial Sea and Contiguous Zone, no boundary limit was accepted. The width of the territorial sea, therefore, may vary from country to country. The United States has long adhered to the widely accepted three mile limit. 43 U.S.C. § 1301(a)(2) (1976). *See e.g.*, *United States v. California*, 332 U.S. 19, 33-34 (1947); *United States v. McRary*, 665 F.2d 674, 677 n.4 (5th Cir. 1982). The high seas are areas outside the territorial sea that are not subject to the sovereignty of any single nation. It is, however, generally accepted that a coastal nation may exercise some limited control beyond its territorial waters. For example, the United States exercises limited control for customs purposes over waters which extend 12 nautical miles from the coast. 19 U.S.C. § 1401(j) (1976). The United States also has limited control over an exclusive economic zone, which covers portions of the continental shelf, 43 U.S.C. § 1331 (1976), and the fishery conservation zone, which extends 200 nautical miles at sea. 16 U.S.C. § 1811 (1979). For a more detailed discussion of the three water divisions, see generally M. McDUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962); P. JESSUP, *THE LAW OF TERRITORIAL WATERS AND MARITIME JURISDICTION* 75-112 (1927); Carmichael, *At Sea with the Fourth Amendment*, 32 U. MIAMI L. REV. 51, 56-59 (1977); Note, *High on the Seas: Drug Smuggling, the Fourth Amendment, and Warrantless Searches at Sea*, 93 HARV. L. REV. 725, 725 n.2 (1980).

A third United Nations convention on the law of the sea was opened for signature on December 10, 1982. *See* Final Act of the Third United Nations Conference on the Law of the Sea, U.N. Doc. A/CONF.62/121, *reprinted in* 21 I.L.M. 1245 (1982) [hereinafter UNCLOS III]. Even if ratified, however, UNCLOS III will not significantly alter the relationship between the three general zones of the navigable sea and national criminal jurisdiction. Departing from the 1958 Conventions, *supra*, the new convention establishes a 12 nautical mile limit for the territorial sea. *Id.* art. 3. In addition, it permits a nation to exercise within 24 nautical miles of its coast the control necessary to enforce its laws within its territory and territorial sea. *Id.* art. 33. The new convention also reaffirms the doctrine of freedom of the high seas for all nations. *Id.* arts. 87 & 89.

The United States has indicated that it will not sign UNCLOS III due to perceived defects in its provisions regarding deep-sea mining. *See* Statement by the President on the Convention on the Law of the Sea, 18 WEEKLY COMP. PRES. DOC. 887 (July 12, 1982).

Approximately 60% of all marijuana imports are transported by sea. *See* NARCOTICS ESTIMATE, *supra* note 1, at 39.

3. *See infra* text accompanying notes 38-46. The United States Supreme Court has expressed its clear intention to adhere to these jurisdictional principles of international law. *The Paquete Habana*, 175 U.S. 677 (1900); *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

4. *See infra* note 102 and accompanying text.

5. *See infra* notes 117 & 118 and accompanying text.

6. A foreign vessel is a vessel owned by residents of a foreign nation or sailing under a

High Seas Jurisdiction

establish adequate jurisdictional grounds based on these principles. Nevertheless, stringent substantive laws that required proof of a nexus between the narcotics aboard the vessels and the United States hampered the control of illegal drug importation.⁷

Between 1970 and 1980 federal law did not proscribe mere possession of, or even possession with intent to distribute, marijuana or other controlled substances beyond U.S. territorial waters.⁸ To convict the crew of a drug-laden vessel seized by the Coast Guard on the high seas, government prosecutors had the burden of proving either conspiracy or attempt to import or distribute narcotics into the United States.⁹ Because prosecutors were often unable to prove a direct connection between the drugs and the United States, smugglers captured on the high seas were frequently set free to return to the drug trade.¹⁰

In 1980, Congress enacted 21 U.S.C. § 955a, the Marijuana on the High Seas Act,¹¹ in an attempt to curb the flow of drugs into the country.¹² Section 955a expressly prohibits persons aboard any vessel subject to U.S. jurisdiction, while on the high seas, from possessing a controlled substance with intent to distribute.¹³ Under this broader prohibition, the government does not have to present any evidence establishing a nexus between the drugs discovered on board a captured vessel and the United States.¹⁴

This Comment examines law enforcement problems concerning illegal drug importation from vessels on the high seas prior to the enactment of section 955a.¹⁵ It then focuses on the changes made under the 1980 statute and discusses the application of section 955a to U.S., stateless, and foreign vessels.¹⁶ Particular emphasis is placed on the Eleventh Circuit courts' interpretation of section 955a, which indicates a possible willingness to extend U.S. criminal jurisdiction to foreign ves-

foreign flag. Article 5 of the Convention on the High Seas states that each nation "shall fix the conditions for the grant of its nationality to ships." Article 5 also requires that there must be a "genuine link" between the country and the ship. *See* Convention on the High Seas, *supra* note 2, art. 5. *See also* UNCLOS III, *supra* note 2, art. 91 (same conditions for nationality of ships).

7. *See infra* notes 56-59 and accompanying text.

8. *Id.*

9. *Id.*

10. *See infra* notes 62-94 and accompanying text.

11. Pub. L. No. 96-350, 94 Stat. 1159, (codified at 21 U.S.C. § 955a (Supp. IV 1980)). *See* United States v. James-Robinson, 515 F. Supp. 1340, 1341 (S.D. Fla. 1981) (referring to § 955a as the Marijuana on the High Seas Act).

12. *See infra* notes 95-101.

13. 21 U.S.C. § 955a(a) (Supp. V 1981).

14. *See infra* text accompanying notes 95-101.

15. *See infra* text accompanying notes 19-29 & 56-61.

16. *See infra* text accompanying notes 95-101.

sels on the high seas.¹⁷ The Comment concludes with an analysis of the issues raised by the application of section 955a to foreign vessels in view of recognized international law principles governing extraterritorial jurisdiction.¹⁸

I. Drug Enforcement Prior to Section 955a

The United States Coast Guard, the nation's primary maritime law enforcement agency, is responsible for enforcing federal laws in U.S. navigable waters and on the high seas.¹⁹ In 1890, a forerunner of the Coast Guard first took steps against maritime drug smuggling by combatting the opium trade on the west coast of the United States.²⁰ Some thirty years later, the Coast Guard was involved in stopping rum-running ships during Prohibition.²¹ As air travel developed, however,

17. See *infra* text accompanying notes 147-52.

18. See *infra* text accompanying notes 165-69.

19. 14 U.S.C. § 2 establishes the Coast Guard as the primary maritime agency charged with the enforcement of federal laws at sea. It provides in relevant part:

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on and under the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States. . . .

14 U.S.C. § 2 (1976). Section 89(a) provides that the Coast Guard is empowered to search and seize any vessel on the high seas that is subject to the jurisdiction and operation of any law of the United States:

(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at times go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States . . . has been committed, by any person, such person shall be arrested, or . . . such vessel or merchandise, or both, shall be seized.

14 U.S.C. § 89a (1976). See *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (upholding the exercise of jurisdiction under § 89a to board and arrest persons on board a vessel on the high seas). For a discussion of the law of search and seizure under § 89a, see generally Carmichael, *supra* note 2; Note, *Fifth Circuit Cases Concerning Search and Seizure upon the High Seas: The Need for a Limiting Doctrine*, 10 GA. J. INT'L & COMP. L. 167 (1980); Note, *supra* note 2.

20. H.R. REP. NO. 323, 96th Cong., 1st Sess. 3 (1979) [hereinafter 1979 HOUSE REPORT]. The present day Coast Guard was established in 1915 by a consolidation of the Revenue Cutter Service and the Life Saving Service. For an historical discussion of the statutory powers of the Coast Guard and its predecessors, see Carmichael, *supra* note 2 at 65-75. See also *Maul v. United States*, 274 U.S. 501, 513-31 (1927) (Brandeis, J. concurring) (discussing origins of Coast Guard).

21. See 1979 HOUSE REPORT, *supra* note 20, at 3. Following the introduction of Prohibition in 1919, a thriving liquor smuggling trade developed. Coast Guard seizures of rum-running ships within territorial waters of the United States were usually upheld by the courts

High Seas Jurisdiction

smugglers no longer depended primarily on sea transport.²² Nevertheless, marijuana smugglers returned to the sea in the 1970s in efforts to increase their profits per haul by loading large quantities in the cargo holds of ships.²³

By 1978, the Coast Guard was reporting frequent drug-related arrests along the southeastern coast of the United States up through the Gulf of Mexico.²⁴ Despite these seizures, the marijuana trade continued to prosper.²⁵ Smugglers loaded marijuana into large vessels, known as motherships, and travelled from Colombia through the Caribbean to rendezvous points off the U.S. coast.²⁶ Smaller and faster "contact" boats were then used to unload the cargo and bring it ashore, while the motherships waited outside U.S. territorial limits.²⁷ In an

on the basis of customs legislation. To remove any remaining doubt, Congress enacted the Tariff Act of 1922, Pub. L. No. 318, ch. 356, 42 Stat. 858 (codified in scattered sections of 18, 19, 29, 46 U.S.C.), authorizing the Coast Guard to board any vessel within 12 miles of the coast. Some smugglers, naturally, escaped the operation of the customs laws by remaining outside the 12 mile limit until they were able to come ashore undetected. For a more comprehensive discussion on smuggling during Prohibition, see Note, "*Smoke on the Water*": *Coast Guard Authority to Seize Foreign Vessels Beyond the Contiguous Zone*, 13 N.Y.U.J. INT'L L. & POL. 249, 256-66 (1980) [hereinafter *Smoke on the Water*].

22. See Note, *Smoke on the Water*, *supra* note 21, at 251.

23. *Id.* Besides the advantage of a greater profit per haul, ships are safer than small planes for the smuggling of drugs. *Id.* See NARCOTICS ESTIMATE, *supra* note 1, at 40.

In 1973, the Coast Guard cutter *Dauntless* seized from two vessels off the Florida coast more than 3,000 pounds of marijuana, worth over a million dollars. This action signalled the start of a new drug war at sea. See 1979 HOUSE REPORT, *supra* note 20, at 3.

24. See 1979 HOUSE REPORT, *supra* note 20, at 3. According to the House Report, the Coast Guard, in 1978, seized 167 vessels, made 867 arrests, and confiscated 3.5 million pounds of contraband. *Id.* at 4.

25. See *supra* note 1.

26. See 1979 HOUSE REPORT, *supra* note 20, at 3. Vessels utilized as motherships vary. Motherships are often converted fishing trawlers, equipped with sophisticated radar and jamming devices and designed to avoid Coast Guard detection. Smugglers also convert old tankers or freighters by stripping out the ship's cabins to increase its carrying capacity for marijuana. Interview with Andrew W. Anderson, Assistant Legal Officer, Seventh Coast Guard District, in Miami (Aug. 10, 1982).

27. Due to the speed and number of these smaller craft, the Coast Guard can confiscate only a small percentage of the illegal drugs brought ashore. The vast Florida coastline is an ideal port of entry for drug-running vessels. The mothership usually maintains a position from 50 to 200 miles at sea, far outside U.S. territorial and customs waters. On the more distant hauls, contact boats are more likely to be luxury yachts or fishing vessels, which shuttle the mothership's cargo to the mainland. On shorter hauls, smaller racing boats, often referred to as "cigarette" boats, are used. These boats are capable of reaching speeds of 70 mph. Many of the cigarette boats are also equipped with devices such as radar scanners and infra-red nightvision scopes to help them evade the Coast Guard. Interview with Andrew W. Anderson, *supra* note 26; 1979 HOUSE REPORT, *supra* note 20, at 3; Kelly, *supra* note 1, at 26. See Ficken, *The 1935 Anti-smuggling Act Applied to Hovering Narcotics Smugglers Beyond the Contiguous Zone: An Assessment Under International Law*, 29 U. MIAMI L. REV. 700 (1975); *Smoke on the Water*, *supra* note 21, at 251. The mothership-contact boat technique is predominant in seaborne drug shipments. Some motherships, however, make deliveries to stash sites in remote cays in the Bahamas instead of rendezvousing with the contact boats at sea for direct importation into the United States. See NARCOTICS ESTIMATE, *supra*

attempt to cut off smugglers' supply lines, the Coast Guard began seizing motherships at various points in the Caribbean Sea.²⁸ Because these seizures took place outside U.S. territorial waters, they involved both domestic and international law.²⁹

A. *Jurisdictional Principles of International Law*

Before the United States can prosecute persons apprehended aboard drug-laden vessels on the high seas, its courts must establish personal jurisdiction over the defendants and subject matter jurisdiction over the crime the defendants allegedly have committed. Under international law, all nations have an equal right to navigate on the world's oceans,³⁰ and the concept of "freedom of the seas,"³¹ dictates that no one nation

note 1, at 39. It is estimated that in 1979 the Coast Guard was, at best, seizing less than 10% of the illegal drugs transported by sea into the United States. See 1979 HOUSE REPORT, *supra* note 23, at 4.

28. Illegal drug shipments by sea from Colombia and other points in South America are made through one of three Caribbean passages. The most direct course for motherships heading north to Florida is through the Windward Passage between Cuba, Jamaica, and Haiti. Alternate routes are through the Yucatan Channel between Cuba and Mexico or the Mona Passage between the Dominican Republic and Puerto Rico. Most other routes from South America are too indirect for smugglers, resulting in a lengthy and costly voyage out into the Atlantic Ocean. By intercepting ships in these three passages, the Coast Guard can significantly limit its patrol area and increase the chances of capturing a drug-laden vessel. Interview with Andrew W. Anderson, *supra* note 26. See NARCOTICS ESTIMATE, *supra* note 1, at 39 (map depicting common drug smuggling routes through the Caribbean).

29. See *United States v. Postal*, 589 F.2d 862, 868 (5th Cir. 1979). See also *supra* note 2.

30. See Convention on the High Seas, *supra* note 2, art. 2. Article 2 states:

The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by other rules of international law. It comprises, *inter alia*, both for coastal and non-coastal States:

- (1) Freedom of navigation;
- (2) Freedom of fishing;
- (3) Freedom to lay submarine cables and pipelines;
- (4) Freedom to fly over the high seas.

These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other states in their exercise of the freedom on the high seas.

Id. See also UNCLOS III, *supra* note 2, art. 87 (same).

31. The Dutch jurist, Hugo Grotius, is credited as the first to develop the freedom of the seas as a principle of international law. See H. GROTIUS, *DE JURI BELLI AC PACIS* 190-91 (1646 ed. F. Kelsey trans. 1925). For centuries, the world's oceans have been considered not subject to any right of ownership, sovereignty, or jurisdiction. Because the seas are incapable of division, it is believed that they are the property of all mankind. Consequently, no one nation can claim to dictate laws for the high seas. See also Note, *Law of the Sea: The Delimitation of the Maritime Boundary Between the United States and the Bahamas*, 33 U. FLA. L. REV. 207, 213-15 (1981).

The concept of freedom of the seas has long been recognized in U.S. law. In 1826, Justice Story wrote for the Supreme Court in *The Mariana Floria*, that no country can appropriate a superior or exclusive prerogative over the oceans. *The Mariana Floria*, 24 U.S. (11 Wheat.) 1, 43 (1826). Most nations today concede that the high seas are not subject to the exclusive sovereignty of any nation. *United States v. Louisiana*, 394 U.S. 11, 23 (1969). See *supra*

High Seas Jurisdiction

can claim sovereignty over the waters extending beyond its own territorial boundaries.³² Strict adherence to this principle would render the United States powerless to prosecute drug traffickers arrested extraterritorially. To overcome this problem, U.S. courts have relied on the authority of the Ker-Frisbie doctrine.³³ According to the doctrine, a defendant cannot challenge a court's personal jurisdiction on the ground that the arrest was illegal.³⁴ By extending the Ker-Frisbie doctrine to arrests resulting from a breach of international law, U.S. courts claim the right to assert in personam jurisdiction over individuals apprehended on the high seas.³⁵

Despite the judiciary's self-imposed authority to exercise personal jurisdiction in these cases, neither Congress nor the courts has expressed an intention to override international law with respect to subject matter jurisdiction over crimes committed aboard vessels in extraterritorial waters.³⁶ Generally, the freedom of the seas principle enjoins nations from asserting subject matter jurisdiction over acts aboard such vessels. International law recognizes a number of exceptions to the principle, however, when the interests of a particular country outweigh the interests of the international community.³⁷ U.S. courts have looked to four of these exceptions—the nationality, objective-territorial, protective,

note 30; *The Le Louis*, 165 Eng. Rep. 1464, 2 Dods. 210 (1817) (British acceptance of the doctrine). For a more comprehensive examination of the concept of freedom of the seas, see J. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA*, 47-86 (6th ed. 1967).

32. Under early international custom, no nation was entitled to exercise control over the sea beyond the range of a cannon shot, which was generally recognized to be about three miles from the coast. See J. COLOMBOS, *supra* note 31, at 92.

33. See *Frisbie v. Collins*, 342 U.S. 519 (1952); *In re Johnson*, 167 U.S. 120 (1897); *Ker v. Illinois*, 119 U.S. 436 (1886).

34. See *supra* note 33. Under the Ker-Frisbie doctrine, a court's power to try a person is not impaired by the manner in which the person was brought within the court's physical custody. The doctrine applies regardless of the citizenship of the person. See *United States v. Winter*, 509 F.2d 975 (5th Cir. 1975). The Ker-Frisbie doctrine has been criticized as violating international law and due process. See Dickinson, *Jurisdiction Following Seizure or Arrest in Violation of International Law*, 28 AM. J. INT'L L. 231, 241 (1934); Scott, *Criminal Jurisdiction of a State Over a Defendant Based Upon Presence Secured by Force or Fraud*, 37 MINN. L. REV. 91, 107 (1934).

35. See *United States v. Postal*, 589 F.2d 862, 873 (5th Cir. 1979) (upholding personal jurisdiction over defendant captured on high seas under Ker-Frisbie doctrine).

36. Under international law a country does not have jurisdiction to enforce one of its laws unless it has jurisdiction to regulate the conduct in question. *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884 (1967); RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 7(2) (1965) [hereinafter RESTATEMENT].

37. Exceptions to the doctrine of freedom of the seas are based on the belief that a certain legal order must be maintained to prevent anarchy on the open seas. See generally 2 D. O'CONNELL, *INTERNATIONAL LAW* 651 (1970); 1 L. OPPENHEIM, *INTERNATIONAL LAW* 593 (8th ed. H. Lauterpacht ed. 1955); *Harvard Research on International Law (Pt. III), Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 445 (1935) [hereinafter 1935 *Harvard Research*].

and universality principles—to justify subject matter jurisdiction over narcotics offenses committed on U.S., stateless, and foreign vessels on the high seas.³⁸

Under the nationality principle, a nation may prosecute its own citizens for crimes defined under its penal code regardless of where they are committed.³⁹ A corollary principle, the law of the flag theory, allows the United States to assert jurisdiction over acts aboard U.S. vessels on the high seas.⁴⁰ The principle is based on the notion that a ship is deemed part of the territory whose flag it flies.⁴¹ It is also predicated on the belief that the laws governing persons aboard vessels should not vary with every change of waters.⁴²

The remaining three principles may provide grounds for jurisdiction over crimes committed on stateless and foreign vessels on the high seas. Unlike the law of the flag theory, they are not restricted to maritime law and have been applied in a number of other contexts.⁴³ The objective-territorial principle may give a nation jurisdiction to prosecute a defendant for committing a crime outside its borders if the crime pro-

38. See *supra* note 3. Other principles of criminal jurisdiction recognized under international law but not applicable to narcotics trafficking on the high seas are: the territoriality principle (jurisdiction based on the place where the offense is committed); and the passive personality principle (jurisdiction based on the nationality of the victim). See *Rivard v. United States*, 375 F.2d 882, 885 (5th Cir.), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884 (1967).

39. See *Lauritzen v. Larsen*, 345 U.S. 571, 584-85 (1953); *United States v. Flores*, 289 U.S. 137, 155 (1933); *Blackmer v. United States*, 284 U.S. 421 (1932); *United States v. Bowman*, 260 U.S. 94, 97 (1922); *United States v. Hayes*, 653 F.2d 8, 15 (1st Cir. 1981); *United States v. Egan*, 501 F. Supp. 1252, 1258 (S.D.N.Y. 1980). See also Clark, *Criminal Jurisdiction over Merchant Vessels Engaged in International Trade*, 11 J. MAR. L. & COMM. 219, 220-21 (1980).

40. It is unclear whether the law of the flag theory is an outgrowth of the nationality principle or the territoriality principle. See *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122-23 (1923) (nationality principle); *United States v. Marino-Garcia*, 679 F.2d 1373, 1380 n.12 (11th Cir. 1982) (nationality principle); *United States v. Newball*, 524 F. Supp. 715, 720 (E.D.N.Y. 1981) (nationality principle); *United States v. Streifel*, 507 F. Supp. 480, 488-89 (S.D.N.Y. 1981) (nationality principle); RESTATEMENT, *supra* note 36, §§ 28-29, 31. But see *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953) (territoriality principle); *United States v. Flores*, 289 U.S. 137, 155-57 (1933) (territoriality principle); Note, *High Seas Narcotics Smuggling and Section 955A of Title 21: Overextension of the Protective Principle of International Jurisdiction*, 50 FORDHAM L. REV. 688, 695 & nn.43-44 (1982) (territoriality principle).

41. A country may exercise jurisdiction over a vessel on the high seas under the law of the flag theory if the vessel is registered in that country or it is owned by a person who resides there. M. AKEHURST, *supra* note 2, at 104. See *infra* note 102. See, e.g., *United States v. Chaparra-Almeida*, 679 F.2d 423 (5th Cir. 1982); *United States v. Del Sol*, 679 F.2d 216 (11th Cir. 1982); *United States v. Freeman*, 660 F.2d 1030 (5th Cir. 1981); *United States v. DeWeese*, 632 F.2d 1267 (5th Cir. 1980); *United States v. Mann*, 615 F.2d 668 (5th Cir. 1980).

42. M. AKEHURST, *supra* note 2, at 104. See *supra* note 40.

43. See generally M. AKEHURST, *supra* note 2, at 103-05.

High Seas Jurisdiction

duced a detrimental effect within that country.⁴⁴ Similarly, a nation has jurisdiction under the protective principle of international law if conduct outside its territory poses a potential threat to the nation's security or governmental functions.⁴⁵

According to the universality principle, a country has jurisdiction over crimes committed outside its territorial borders if the conduct at issue is deemed universally outrageous.⁴⁶ No specific nexus with the country pressing prosecution is required. Recently a number of courts in the United States have examined the universality principle as a possible basis for jurisdiction in narcotics cases,⁴⁷ and have scrutinized various international treaties to determine which particular offenses constitute universal crimes. For example, the 1958 Convention on the High Seas,⁴⁸ to which the United States is a signatory, specifically grants nations extraterritorial jurisdiction over persons engaged in

44. For example, a nation would have subject matter jurisdiction under this principle if a person were to fire a bullet across its border and kill someone on the other side. *M. AKEHURST*, *supra* note 2, at 104. Courts in the United States have long relied on the objective-territorial principle as a basis for asserting extraterritorial jurisdiction. *See Ford v. United States*, 273 U.S. 593, 622-24 (1927); *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *United States v. Cadena*, 585 F.2d 1252, 1257 (5th Cir. 1978); *United States v. King*, 552 F.2d 833, 851-52 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *Rivard v. United States*, 375 F.2d 882, 887 (5th Cir.), *cert. denied sub nom. Groleau v. United States*, 389 U.S. 884 (1967); *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D.N.Y. 1980). A conspiracy on the high seas illegally to import drugs into the United States falls within the objective-territorial principle despite the absence of an overt act within the United States. *See United States v. Gray*, 659 F.2d 1296 (5th Cir. 1981) (vessel seized on high seas 100 miles off Florida coast); *United States v. Mann*, 615 F.2d 668 (5th Cir. 1980) (vessel seized on high seas off the Yucatan Peninsula); *United States v. Perez-Herrera*, 610 F.2d 289 (5th Cir. 1980) (vessel seized 70 miles from U.S. coast); *United States v. Baker*, 609 F.2d 134 (5th Cir. 1980) (vessel seized nine miles from U.S. coast); *United States v. Cortes*, 588 F.2d 106 (5th Cir. 1979) (vessel seized 26 miles from U.S. coast); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978) (vessel seized 200 miles from U.S. coast); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (vessel seized 700 miles from U.S. coast).

45. *See* 1935 HARVARD RESEARCH, *supra* note 37 at 543. *See also United States v. Pizarusso*, 388 F.2d 8, 10 (2d Cir. 1968), *cert. denied*, 392 U.S. 936 (1968); *United States v. Egan*, 501 F. Supp. 1252, 1257 (S.D.N.Y. 1980); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978); *United States v. Rodriguez*, 182 F. Supp. 479, 489 (S.D. Cal. 1960).

Use of the protective principle historically has been restricted to crimes such as spying, plots to overthrow the government, currency forgery, and false statements on visa applications. *See AKEHURST*, *supra* note 2, at 104. *See also* RESTATEMENT, *supra* note 36, § 33 n.1. Only recently have courts applied the protective principle to the problem of drug smuggling. In view of the size of the drug problem in the United States, these courts reason that unlawful importation of a controlled substance represents a threat to the security of the United States. *See United States v. Perez-Herrera*, 610 F.2d 289, 291-92 (5th Cir. 1980); *United States v. Keller*, 451 F. Supp. 631, 635 (D.P.R. 1978). For a discussion of the protective principle in relation to drug smuggling, see Note, *Drug Smuggling and the Protective Principle: A Journey into Uncharted Waters*, 39 LA. L. REV. 1189 (1979).

46. *M. AKEHURST*, *supra* note 2, at 104-05; RESTATEMENT, *supra* note 36, § 34.

47. *See United States v. Marino-Garcia*, 679 F.2d 1373, 1382 n.16 (11th Cir. 1982); *United States v. Smith*, No. 81-1278, slip op. (1st Cir. June 8, 1982).

48. 1958 Convention on the High Seas, *supra* note 2. *See also supra* note 4.

piracy aboard vessels on the high seas.⁴⁹ Because the treaty also grants nations the power to board ships engaged in slave trade in international waters,⁵⁰ some commentators contend that slavery also constitutes a universal offense.⁵¹ The treaty, however, makes no mention of drug trafficking.

Unlike the 1958 Convention, the 1961 Single Convention on Narcotic Drugs⁵² specifically addressed the international drug problem. The treaty's preamble calls for worldwide cooperation in controlling narcotic drug abuse.⁵³ Furthermore, the penal provisions governing illicit drug traffic grant prosecutorial authority to any signatory nation in whose territory an offense was committed or an offender is found.⁵⁴ The treaty fails, however, to provide for extraterritorial jurisdiction under the universality principle. Because drug trafficking has never been expressly condemned as a universal crime under international law, courts have been reluctant to employ the exception.⁵⁵

B. Domestic Legislation

The Comprehensive Drug Abuse Prevention and Control Act of 1970 (Comprehensive Act)⁵⁶ is the principal federal statute under

49. 1958 Convention on the High Seas, *supra* note 2, art. 19. Article 19 of the treaty states:

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the person and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed. . . .

Id. See also UNCLOS III, *supra* note 2, art. 105 (same); *id.* art. 100 (duty to cooperate in repressing piracy).

50. 1958 Convention on the High Seas, *supra* note 2, art. 22. Article 22 permits a warship of a nation, such as a Coast Guard vessel, to board a ship sailing under a foreign flag for purposes of search and seizure when there are reasonable grounds for suspecting piracy or slave trade. *Id.* See also UNCLOS III, *supra* note 2, art. 105.

51. See Note, *supra* note 40, at 692 n.27.

52. The Single Convention on Narcotic Drugs, open for signature March 30, 1961, 18 U.S.T. 1407, T.I.A.S. 6298, 520 U.N.T.S. 204. The agreement entered into force for the United States on June 24, 1967. *Id.*

53. The preamble to the Convention states in relevant part:

Considering that effective measures against abuse or narcotic drugs require co-ordinated and universal action,

Understanding that such universal action calls for international co-operation

Desiring to conclude a generally acceptable international convention replacing existing treaties on narcotic drugs . . . providing for continuous international co-operation and control for the achievement of such aims and objectives.

See *id.* preamble. See also *id.* art. 35.

54. See *id.* art. 36 (IV).

55. Apparently no court has used the universality principle to obtain jurisdiction over drug smugglers arrested aboard vessels on the high seas.

56. Pub. L. No. 91-513, 84 Stat. 1236 (codified at 21 U.S.C. §§ 801-803, 811-812, 821-830, 841-852, 871-886, 901-904, 951-966 (1976 & Supp. IV 1980) [hereinafter Comprehensive

High Seas Jurisdiction

which drug offenders are prosecuted. The legislative intention of the Comprehensive Act was to deal completely and consistently with problems relating to possession and importation of drugs into the United States.⁵⁷ In drafting the Act, Congress, however, inadvertently repealed 21 U.S.C. § 184(a), the provision that expressly prohibited possession of a controlled substance aboard U.S. vessels on the high seas, and failed to include any replacement provision.⁵⁸ Therefore, the Comprehensive Act prohibited possession of narcotics within U.S. territorial waters, but did not proscribe possession on the high seas unless there was evidence of conspiracy or attempt to import or distribute narcotics into the United States.⁵⁹ In the absence of such evidence, drug traffickers often operated beyond the reach of U.S. law. Because of this loophole, prosecutions of smugglers captured on the high seas often were dismissed at the preliminary hearing stage for lack of evidence of intent to distribute in this country.⁶⁰ Consequently, even in instances where the Coast Guard was able to confiscate illegal drugs aboard the vessels, the government was often unable to meet the burden necessary for prosecution.⁶¹

C. *The Revolving Door*

The inadequacy of the Comprehensive Act was clearly demonstrated in *United States v. Hayes*.⁶² In *Hayes*, the defendants appealed their conviction of attempted importation and possession of marijuana with intent to distribute.⁶³ The Coast Guard had boarded the defendants' fishing vessel approximately 110 miles southeast of Puerto Rico and confiscated thirteen tons of marijuana.⁶⁴ Because the vessel was regis-

Act]. See also H.R. REP. NO. 1444, 91st Cong. 2d Sess., reprinted in 1970 U.S. CODE CONG. & AD. NEWS 4566.

57. *Id.* at 4567. See S. REP. NO. 613, 91st Cong., 2d Sess. (1969).

58. See 1979 HOUSE REPORT, *supra* note 20, at 4. See also *United States v. Riker*, 670 F.2d 987, 988 (11th Cir. 1982).

59. See S. REP. NO. 855, 96th Cong. 1st Sess. 1, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 2785. See also 1979 HOUSE REPORT, *supra* note 20, at 5.

60. See 125 Cong. Rec. 20,082-83 (1979) (comments of Congressman Biaggi).

61. Even in those cases that did proceed further than the early stages of prosecution, evidence to prove beyond a reasonable doubt either attempted importation into the United States or conspiracy was often impossible to obtain for trial. See S. REP. NO. 613, 91st Cong., 2d Sess. (1969).

62. 653 F.2d 8 (1st Cir. 1981).

63. *Id.* at 10. Defendants-appellants appealed their convictions of attempted importation of marijuana into the United States in violation of 21 U.S.C. § 963 and possession of marijuana with intent to distribute in violation of 21 U.S.C. § 841(a)(i). *Id.*

64. *Id.* The Coast Guard cutter *Gallatin*, which made the stop, was under orders to intercept any U.S. vessel under 200 feet in length to assure compliance with all U.S. laws. *Id.*

tered in the United States,⁶⁵ the prosecution asserted extraterritorial subject matter jurisdiction under the law of the flag theory.⁶⁶ The prosecution further argued that the evidence was sufficient to sustain a conviction under the Comprehensive Act because the defendants admitted their intent to distribute, even though distribution may have been intended in a foreign country.⁶⁷ The court upheld the conviction for attempted importation,⁶⁸ but ruled that under the prevailing federal statute, possession of marijuana aboard a U.S. vessel on the high seas with intent to distribute would not constitute a crime absent proof of intent to distribute in the United States.⁶⁹ Thus, despite the otherwise valid jurisdictional ground under the law of the flag theory,⁷⁰ the legislative loophole in the Comprehensive Act prevented the government from securing a conviction for possession with intent to distribute.⁷¹

Similarly, prosecutions against crewmembers aboard stateless and foreign vessels in international waters were successful only in instances where clear proof existed to support a finding of conspiracy or intent to distribute narcotics within the United States.⁷² For example, in *United States v. Caicedo-Asprilla*,⁷³ the court upheld the defendants' convictions for conspiring to import marijuana into the United States and for distributing with knowledge that it would be unlawfully imported into the United States.⁷⁴ In that case, the Coast Guard had boarded a thirty-foot power boat, the *Mermaid*, in Florida inland waters and discovered residue from marijuana cargo.⁷⁵ One of the crewmembers, after his arrest, confessed that he received the marijuana from a

65. *Id.* See also *infra* note 104 and accompanying text.

66. 653 F.2d at 15. See also *supra* notes 40-42 and accompanying text.

67. 653 F.2d at 12. The defendants stated at trial that they intended to distribute the marijuana in Europe. *Id.* The U.S. attorney stated in his closing argument, "As long as you have that marijuana in a piece of territory of the United States, even if that territory is floating, you have committed the offense." *Id.* at 14.

68. *Id.* at 16. See *supra* note 63.

69. 653 F.2d at 15. Because Congress did not expressly provide that 21 U.S.C. § 841(a)(1), which makes possession with intent to distribute a crime, applies extraterritorially, the court ruled that the prosecution had to prove the intent was to distribute in the United States. *Id.*

70. The court acknowledged that Congress has the power to make possession of a controlled substance on a U.S. vessel on the high seas a crime under the law of flag theory. The deciding issue, however, was that Congress did not intend to do so. *Id.*

71. *Id.* at 16.

72. See *supra* notes 56-61 and accompanying text.

73. 632 F.2d 1161 (5th Cir. 1980).

74. *Id.* at 1164. The thirteen defendants were appealing their convictions under 21 U.S.C. §§ 952(a), 959(2), 963. *Id.*

75. 632 F.2d at 1164.

High Seas Jurisdiction

mothership anchored in the Gulf of Mexico.⁷⁶ A Coast Guard helicopter later spotted a fishing boat, similar in description, anchored fifty-two miles off the Florida coast.⁷⁷ Upon boarding the vessel, the authorities found more than 200 bales of marijuana and arrested the crew.⁷⁸ The ship flew no flag and carried no documentation of its registry.⁷⁹

The court based jurisdiction over the stateless vessel on the objective-territorial principle,⁸⁰ reasoning that even though the illegal acts occurred outside the country's territorial limits, they clearly had effects within the United States.⁸¹ Furthermore, the court upheld the criminal conspiracy conviction on the basis of evidence that the defendants had participated in a sophisticated smuggling operation and had carried out their plan by transferring narcotics into the contact boat.⁸² Regarding the distribution charge, the court ruled that the evidence showed conclusively that marijuana from Colombia was distributed to the contact boat, the *Mermaid*, for importation into this country, satisfying the requirements of the Comprehensive Act.⁸³

Apart from the decision in *Caicedo-Asprilla*, which found the requisite intent, successful prosecutions against drug smugglers on stateless vessels were rare under the Comprehensive Act.⁸⁴ The Act's language also was an impediment to the government's attempts to apprehend foreign vessels carrying controlled substances beyond U.S. territorial limits. In *United States v. Cadena*,⁸⁵ the court upheld a conviction for conspiracy to import marijuana,⁸⁶ but reversed a conviction for conspiracy to distribute within the United States.⁸⁷ In *Cadena*, the Coast Guard boarded a foreign freighter carrying a cargo of marijuana in

76. *Id.* The crew member stated that the mothership was located about 45 to 55 miles off the Florida coast in the Gulf of Mexico. *Id.*

77. *Id.* at 1164-65.

78. *Id.* at 1165.

79. *Id.* For an explanation of what constitutes a stateless vessel under international law, see *infra* notes 117 & 118 and accompanying text. In *Caicedo-Asprilla* the word "Panama," was affixed beneath the name "Albazul" on the cabin of the mothership, indicating that the vessel was of foreign registry. Another nameplate bearing a different name was also found, however, which reduced the ship to a stateless status. 632 F.2d at 1165.

80. 632 F.2d at 1166. See also *supra* note 44 and accompanying text.

81. 632 F.2d at 1166.

82. *Id.* at 1166-67.

83. *Id.*

84. See *supra* notes 56-61 and accompanying text.

85. 585 F.2d 1252 (5th Cir. 1978).

86. *Id.* at 1266. The court upheld the defendant's conviction of conspiracy to import marijuana under 21 U.S.C. § 846.

87. *Id.* at 1266. The court reversed the defendant's conviction of conspiracy to distribute marijuana in the United States under 21 U.S.C. § 846. *Id.* at 1256.

international waters and arrested the foreign crewmembers.⁸⁸ The seizure was the result of a two-month investigation that began after federal agents in Florida were advised that a local party sought a boat to rendezvous with a freighter on the high seas. The boat was to receive a large quantity of marijuana from the freighter and deliver the shipment in Florida.⁸⁹ Establishing jurisdiction under the objective-territorial principle,⁹⁰ the court ruled that the government proved conspiracy to import through witnesses' testimony of the arrangements the defendant made for the rendezvous.⁹¹ The court, however, did not find sufficient evidence to demonstrate that the defendant aboard the freighter knew of any distribution scheme within the United States.⁹²

As these cases show, proof of intent to distribute in or conspiracy to import into the United States was a difficult burden for prosecutors. Occasional convictions for the lesser charge of attempted importation had little deterrent effect on drug smugglers, as leaders of trafficking organizations considered the government's limited success merely part of the cost of doing business.⁹³ Thus, under the restrictive language of the Comprehensive Act, the Coast Guard was forced, for the most part, to confine its war against the drug trade to areas within territorial waters.⁹⁴

88. *Id.* at 1256. The seizure took place on the high seas about 200 miles off the Florida coast. *Id.*

89. *Id.* Drug Enforcement Administration agents rendezvoused with the defendant's vessel at sea. The Coast Guard cutter *Dauntless* was then called to the scene after the defendants loaded 150 bails of marijuana onto the agent's boat. *Id.*

90. *Id.* See *supra* note 44 and accompanying text.

91. 585 F.2d at 1265-66.

92. *Id.* at 1266. Because the prosecution could not establish that the defendant had knowledge of the distribution scheme in the United States, he could not be convicted under 21 U.S.C. § 846. *Id.*

93. After chairing field hearings on Coast Guard drug enforcement efforts in the Caribbean and the Gulf of Mexico, Congressman Biaggi spoke before the House of Representatives and described a typical high seas arrest:

I was present when the 95-foot Coast Guard patrol boat *Cape Current* . . . escorted the pleasure vessel *David* to the Coast Guard base at Miami Beach. The *David* had been seized on the high seas when it was found to contain over 2,500 pounds of marihuana. Six crewmen were on board.

In a case like this, the marihuana is burned or shredded and the vessel is impounded. The fate of the crew is more speculative. In the absence of evidence to prove conspiracy to import—which is the usual case—they will go free. If they are of foreign nationality, they are sent home at the expense of the U.S. Government. In either case, they will be able to return to the drug trade within a short time. The present law is thus no deterrent to repeat offenders.

125 CONG. REC. 20,082 (1979) (comments of Congressman Biaggi).

94. As a result, the Coast Guard was fighting a losing battle. Under the Comprehensive Act, over 80% of U.S. citizens arrested on the high seas for drug smuggling by the Coast Guard could not be successfully prosecuted. In addition, virtually all foreign smugglers

II. Enactment of 21 U.S.C. § 955a

Responding to the critical omission in the Comprehensive Act and further broadening the scope of federal narcotics laws, Congress enacted 21 U.S.C. § 955a in 1980.⁹⁵ In the specific wording of section 955a as well as in its legislative history, Congress expressed its clear intention to authorize extraterritorial jurisdiction.⁹⁶ Section 955a(a) specifically prohibits any person on board a U.S. vessel or a vessel subject to U.S. jurisdiction on the high seas from knowingly or intentionally possessing a controlled substance with intent to manufacture or distribute.⁹⁷ Section 955a(b) forbids U.S. citizens on board any vessel to engage in illicit drug activities.⁹⁸ Thus, the statute criminalizes acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States.⁹⁹ Section 955a requires no

arrested on the high seas were not only released, but were given a free trip back to their home country. *Id.* at 6381 (comments of Congressman Murphy).

95. See *supra* note 11. The sudden increase of narcotics smuggling in the 1970s made drug enforcement authorities acutely aware of the federal law's inadequacies pertaining to the prosecution of crewmembers aboard U.S., stateless, and foreign vessels in international waters. In 1977, the problem came to the attention of the House Subcommittee on Coast Guard and Navigation, which began hearings to determine how to remedy the loophole. On March 1, 1979, H.R. 2538 (later codified as 21 U.S.C. § 955a) was introduced by Mario Biaggi, Chair. Subcomm. on Coast Guard and Navigation, Lester L. Wolff, Chair. House Select Comm. on Narcotics Abuse and Control, Benjamin A. Gilman, Select Comm., John M. Murphy, Chair. Comm. on Merchant Marine and Fisheries, together with more than fifty co-sponsors. See 1979 HOUSE REPORT, *supra* note 20, at 6.

96. Federal statutes are generally presumed to apply only within U.S. territory, unless Congress clearly states its intention to give the statute extraterritorial effect or if it is apparent that the statute's purpose would be defeated unless applied extraterritorially. See *United States v. Mitchell*, 553 F.2d 996, 1002 (5th Cir. 1977); *United States v. Burke*, No. 82-0063 (D.P.R. June 10, 1982); RESTATEMENT, *supra* note 36, § 38, n.1.

The drafters of section 955a make it clear throughout the legislative record that they intend for the act to apply extraterritorially. See 1979 HOUSE REPORT, *supra* note 20. See also 125 CONG. REC. 20,082-84 (1979) (statement of Congressman Biaggi). Section 955a(h) states, "This section is intended to reach acts of possession, manufacture, or distribution committed outside the territorial jurisdiction of the United States." 21 U.S.C. § 955a(h) (Supp. IV 1980). But see *infra* note 143 (Congress did not intend that section 955a be applied extraterritorially in violation of international law). Congress is granted the power to legislate extraterritorially by Article I, Section 8, Clause 10 of the United States Constitution, which authorizes Congress "to define and punish Piracies and Felonies committed on the High Seas, and offenses against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10.

97. Section 955a(a) states:

(a) It is unlawful for any person on board a vessel of the United States, or on board a vessel subject to the jurisdiction of the United States on the high seas, to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance.

21 U.S.C. § 955a(a) (Supp. IV 1980).

98. Section 955a(b) provides: "It is unlawful for a citizen of the United States on board any vessel to knowingly or intentionally manufacture or distribute, or to possess with intent to manufacture or distribute, a controlled substance." 21 U.S.C. § 955a(b) (Supp. IV 1980).

99. Section 955a also criminalizes the manufacture or distribution of a controlled substance, or possession with intent to manufacture or distribute, on board any vessel within

proof of a connection to this country at all; proof of intent to distribute anywhere in the world is sufficient for conviction. Furthermore, under the statutory scheme, intent may be inferred from the mere presence of a controlled substance in an amount greater than that associated with normal consumption.¹⁰⁰ As a result, section 955a effectively closes the previous statutory loophole that existed under the Comprehensive Act. The only remaining question is whether the United States can, consistent with international law, prosecute smugglers aboard any kind of vessel on the high seas under section 955a.¹⁰¹

A. Prosecuting Persons Aboard U.S. Vessels

Section 955b defines a U.S. vessel as a vessel registered in the United States or one owned in whole or in part by a U.S. citizen.¹⁰² In *United States v. Riker*,¹⁰³ the Eleventh Circuit affirmed the defendants' convictions under section 955a for possession with intent to distribute marijuana while aboard a U.S. vessel.¹⁰⁴ In that case, the Coast Guard boarded the *Restless*, a sloop registered in the United States, which had been travelling approximately twenty miles northwest of Bimini.¹⁰⁵ They found fifty-five bales of marijuana on board and arrested the

U.S. customs waters. 21 U.S.C. § 955a(c) (1980). It is recognized under international law that a nation may exercise jurisdiction over criminal acts committed within its customs waters. See *supra* note 2. See also Convention on the Territorial Sea and Contiguous Zone, *supra* note 2, art. 24.

100. See, e.g., *United States v. Mann*, 615 F.2d 668, 670 (5th Cir. 1980); *United States v. Rodriguez*, 585 F.2d 1234, 1246 (5th Cir. 1978), *aff'd*, 612 F.2d 906 (5th Cir. 1980) (en banc); *United States v. Perry*, 480 F.2d 147, 148 (5th Cir. 1973); *United States v. Mather*, 465 F.2d 1035 (5th Cir.), *cert. denied*, 409 U.S. 1085 (1972).

101. For a governmental view of the possible jurisdictional problems under § 955a, see Raskin, *The New Federal Statute on a High Seas Seizure—A Governmental View*, FLA. B.J., Feb. 1982, at 168. See also Ramirez, *The New Federal Statute on High Seas Seizures—A Defense View*, FLA. B.J., Jan. 1982, at 69 (examination of the jurisdictional issues under § 955a from the defense perspective).

102. 21 U.S.C. § 955b(c) (1980). The section reads:

(c) "Vessel of the United States" means any vessel documented under the laws of the United States, or numbered as provided by the Federal Boat Safety Act of 1971, as amended, or owned in whole or in part by the United States, . . . or any State, Territory, District, Commonwealth, or possession thereof, unless the vessel has been granted nationality by a foreign nation in accordance with article 5 of the Convention on the High Seas, 1958.

Id. Section 911(2) of Title 46 of the United States Code defines the term "documented" as meaning "registered or enrolled or licensed under the laws of the United States, whether permanently or temporarily." 46 U.S.C. § 911(2) (1920). See *United States v. Newball*, 524 F. Supp. 715, 718-19 (E.D.N.Y. 1981) (discussing what is a vessel of the United States). See also *United States v. Julio-Diaz*, 678 F.2d 1031, 1033 (11th Cir. 1982).

103. 670 F.2d 987 (11th Cir. 1982).

104. *Id.*

105. *Id.* The *Restless* was traveling at slow speed on a heading that would have taken it to south Florida. *Id.*

High Seas Jurisdiction

crew.¹⁰⁶

The defendants argued that because the ship neither originated from nor was destined for a U.S. port, their activity aboard the vessel on the high seas was beyond the reach of U.S. law.¹⁰⁷ Exercising jurisdiction under the law of the flag theory,¹⁰⁸ the court stated that the United States had authority to define and punish criminal offenses aboard ship just as it has on U.S. territory.¹⁰⁹ According to the court, the only remaining issue was whether Congress, in enacting section 955a, intended to exercise that authority.¹¹⁰ The court scrutinized section 955a's legislative history and found that it expressed a congressional desire to prevent drug traffickers from further evading U.S. law through statutory oversight.¹¹¹ In addition, the court examined the statute's specific wording to determine its intended scope.¹¹² It ruled that Congress' enactment of section 955a banished doubt that the United States may sanction extraterritorial acts of narcotics possession aboard U.S. vessels.¹¹³

B. *Applying Section 955a to Crewmembers Aboard Stateless Vessels*

Prior to the enactment of section 955a, federal courts upheld U.S. jurisdiction over stateless vessels on the high seas,¹¹⁴ but only upon a showing that the vessel was involved in illegal activity tending to have an effect in this country.¹¹⁵ Section 955a expressly extends subject mat-

106. *Id.* at 988.

107. *Id.* The defendants contended that Congress lacked the power to proscribe the conduct for which they were charged and that, therefore, the district court did not have subject matter jurisdiction to punish them. *Id.*

108. *Id.* See *supra* notes 39-42 and accompanying text.

109. 670 F.2d at 988. As authority, the court cited *Lauritzen v. Larsen*, 345 U.S. 571, 585 (1953); *United States v. Flores*, 289 U.S. 137, 151-52 (1933); *United States v. Reagan*, 453 F.2d 165, 170 & n.2 (6th Cir. 1971), *cert. denied*, 406 U.S. 946 (1972).

110. 670 F.2d at 988.

111. *Id.* The court determined that the primary purpose behind the passage of section 955a was to close the loophole that had hampered law enforcement efforts since 1970. *Id.* For the legislative history of section 955a, see generally *supra* notes 95-101; 1979 HOUSE REPORT, *supra* note 20.

112. 670 F.2d at 988. See also *supra* note 97.

113. 670 F.2d at 988. The *Riker* court concluded that Congress intended section 955a to apply extraterritorially. *Id.* Since the *Riker* decision, the Eleventh Circuit has upheld jurisdiction over U.S. vessels on the high seas under section 955a. See *United States v. Del Sol*, 679 F.2d 216, 217 (11th Cir. 1982) (citing *Riker* as precedent); *United States v. Julio-Diaz*, 678 F.2d 1031, 1033 (11th Cir. 1982) (citing *Riker* as precedent); *United States v. Liles*, 670 F.2d 989, 990 n.2 (11th Cir. 1982) (citing *Riker* as precedent).

114. See *supra* notes 73-83 and accompanying text.

115. *Id.* See, e.g., *United States v. Arra*, 630 F.2d 836 (1st Cir. 1980); *United States v. Monroy*, 614 F.2d 61 (5th Cir.), *cert. denied*, 449 U.S. 892 (1980); *United States v. Dominguez*, 604 F.2d 304 (4th Cir. 1979); *United States v. Egan*, 501 F. Supp. 1252 (S.D.N.Y. 1980); *United States v. May-May*, 470 F. Supp. 384 (S.D. Tex. 1979).

ter jurisdiction over crimes committed aboard stateless vessels on the high seas without proof of a nexus between the alleged crime and the United States.¹¹⁶ According to the statute, a stateless vessel subject to the jurisdiction of the United States is one which does not sail under the flag of any nation¹¹⁷ or sails under the flags of two or more nations to hide its true identity.¹¹⁸

In *United States v. Angola*,¹¹⁹ the court examined the validity of asserting extraterritorial jurisdiction over persons aboard stateless vessels charged with violating section 955a. Coast Guard officials boarded a stateless vessel located approximately 350 miles from the United States¹²⁰ and apprehended foreign crewmembers for possession of marijuana with intent to distribute.¹²¹ The defendants argued that the claim of subject matter jurisdiction over the acts of foreign nationals aboard stateless vessels was unconstitutional when those acts had no intended effect in the United States.¹²² Rejecting this argument, the court stated that the protective principle supports jurisdiction even when an activity the United States seeks to regulate has only a potentially adverse effect on the nation.¹²³ Thus, proof of an actual harmful effect was unnecessary.

According to the *Angola* court, Congress reasonably considered the growing drug problem to have a potentially harmful effect on the United States.¹²⁴ The court acknowledged that the crew aboard the seized mothership may not have had the specific intent to import marijuana into the country. Nevertheless, the probability that the drugs would be transferred to smaller boats planning to enter the United States was deemed critical.¹²⁵ Hence, the court concluded that the ac-

116. See 21 U.S.C. § 955a(a) (Supp. IV 1980). According to 21 U.S.C. § 955b(d): "Vessel subject to the jurisdiction of the United States' includes a vessel without nationality or a vessel assimilated to a vessel without nationality, in accordance with paragraph (2) of article 6 of the Convention on the High Seas, 1958." 21 U.S.C. § 955b(d) (Supp. IV 1980). See also UNCLOS III, *supra* note 2, art. 92 (same).

117. See 21 U.S.C. § 955(b)(d) (Supp. IV 1980).

118. See *supra* note 116. Paragraph (2) of article 6 of the 1958 Convention on the High Seas, to which section 955b(d) refers, states: "A ship which sails under the flags of two or more States, using them according to convenience, may not claim any of the nationalities in question with respect to any other State, and may be assimilated to a ship without nationality." See Convention on the High Seas, *supra* note 2, art. 6. See also UNCLOS III, *supra* note 2, art. 92 (same).

119. 514 F. Supp. 933 (S.D. Fla. 1981).

120. The vessel was seized just west of the Bahamian island of San Salvador. *Id.* at 936.

121. *Id.* at 935.

122. *Id.* at 934.

123. *Id.* at 935.

124. *Id.*

125. *Id.* at 936. The court noted this was not a case where a stateless vessel was stopped halfway around the world. The place of seizure was a well-known rendezvous point for

High Seas Jurisdiction

tivity aboard the mothership posed a threat to this country and justified the assertion of jurisdiction.¹²⁶

Despite this ruling, the court's reasoning indicates that the protective principle as a jurisdictional basis for prosecution may be limited. Although the defendants in *Angola* were charged under section 955a, the court based its decision on proof of a sufficient connection between the crime and the United States, similar to that required under prior law. It is unlikely, therefore, that the protective principle would have been applied without the establishment of a nexus. Thus the case cannot be said to have addressed directly the general jurisdictional questions posed by acts aboard stateless vessels.

C. *The Marino-Garcia Decision*

To avoid opening the door to another statutory loophole with regard to stateless vessels, the Eleventh Circuit circumvented the jurisdictional issue completely in *United States v. Marino-Garcia*.¹²⁷ In *Marino-Garcia*, Coast Guard officials boarded a stateless vessel sixty-five miles off the west coast of Cuba and 300 miles from Florida, and discovered approximately 57,000 pounds of marijuana.¹²⁸ There was no evidence that the contraband was intended for the United States.¹²⁹ Nevertheless, the nine crewmembers aboard, all foreign nationals, were arrested and charged with conspiracy to possess marijuana and possession with intent to distribute.¹³⁰ The defendants appealed on the ground that the court's assertion of jurisdiction over a stateless vessel on the high seas, absent proof of a nexus with the United States, violated international law.¹³¹

drug smugglers intending to pick up marijuana for distribution in the United States. In effect, the *Angola* court established a nexus between the vessel and the United States as was required prior to the enactment of § 955a. *Id.*

126. *See id.* The defendants also argued that foreign nationals cannot be held to notice that their actions on the high seas might violate U.S. law. The court acknowledged that the defendants may not have been aware of the specific statute involved. Nevertheless, the court reasoned that persons travelling aboard stateless vessels are presumed to know they are subject to U.S. jurisdiction as well as the jurisdiction of other nations. *Id.* at 935. For a similar discussion concerning notice to foreign nationals, see *United States v. Marino-Garcia*, 679 F.2d 1373, 1384 n.19 (11th Cir. 1982). *See also infra* notes 155-61 and accompanying text.

127. 679 F.2d 1373 (11th Cir. 1982).

128. *Id.* at 1378. The case is actually a consolidation of two separate appeals. The facts, however, are substantially the same. In the companion case, *United States v. Cassalins-Guzman*, No. 82-5284, the Coast Guard encountered a stateless vessel on the high seas also in the vicinity of Cuba. Upon boarding for verification of the ship's registration, Coast Guard officials discovered approximately 20,000 pounds of marijuana. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 1379. The defendants argued that the court does not have subject matter

In upholding the conviction, the court explicitly rejected the kind of nexus analysis that the *Angola* court implicitly had employed¹³² and held that in regard to stateless vessels, proof of a connection between the narcotics and the United States is not required for a conviction.¹³³ The court emphasized that stateless vessels have no internationally recognized right to navigate freely on the high seas.¹³⁴ Terming such ships "floating sanctuaries from authority," the court added that these vessels constitute a potential threat to navigational order and stability on the high seas.¹³⁵ The court concluded that international law permits any nation to subject stateless vessels on the high seas to its jurisdiction, because the assertion of jurisdiction would not interfere with the affairs of another sovereign nation.¹³⁶ Proof of a nexus to the United States was held unnecessary because jurisdiction existed solely as a consequence of the vessel's status as stateless.¹³⁷ Such status subjected the vessel to the laws of all nations proscribing certain activities aboard flagless vessels, and subjected those persons aboard to prosecution.¹³⁸

The court also rejected the defendants' contention that section 955a was fundamentally unfair because it subjected crewmembers aboard a foreign ship en route to a foreign country to criminal sanctions without notice.¹³⁹ The crewmembers were charged with a general understanding of international law¹⁴⁰ and held that persons aboard flagless vessels engaging in illegal activity in international waters had constructive no-

jurisdiction over stateless vessels absent proof of a nexus between the vessel and the United States. *Id.*

The legislative history of section 955a indicates that it was the intent of Congress to extend U.S. jurisdiction under section 955a only to the maximum permitted under international law. See 1979 HOUSE REPORT, *supra* note 20, at 11; 125 CONG. REC. 20,083 (statement by Congressman McCloskey emphasizing that section 955a is to be used "to the broadest extent possible under international law"). See also *supra* note 38 and accompanying text.

132. 679 F.2d at 1377 n.1. See *supra* notes 119-26 and accompanying text (*Angola*).

133. 679 F.2d at 1377.

134. *Id.* at 1382. See also Convention on the High Seas, *supra* note 2, art. 6; UNCLOS III, *supra* note 2, art. 92; United States v. Cortes, 588 F.2d 106, 109 (5th Cir. 1979); United States v. May-May, 470 F. Supp. 384, 398 (S.D. Tex. 1979). See generally H. MEYERS, THE NATIONALITY OF SHIPS 318 (1967); M. McDUGAL & W. BURKE, *supra* note 2, at 1804 (1962); 9 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 21 (1968).

135. 679 F.2d at 1382.

136. *Id.* at 1383. See also United States v. Howard-Arias, 679 F.2d 363 (4th Cir. 1982); United States v. Dominguez, 604 F.2d 304, 308 (4th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980); United States v. Rubies, 612 F.2d 397, 403 (9th Cir. 1979), *cert. denied*, 446 U.S. 940 (1980); United States v. Cortes, 588 F.2d 106, 110 (5th Cir. 1979).

137. 679 F.2d at 1383.

138. *Id.*

139. *Id.* at 1384 n.19.

140. *Id.* The court reasoned that in light of the recent worldwide concern for drug trafficking, the defendants should have been on notice that the United States, or any other nation, may subject stateless vessels engaged in such activities to its jurisdiction. *Id.*

tice that they would be subject to U.S. criminal jurisdiction.¹⁴¹

III. Examining Section 955a's Application to Foreign Persons Aboard Foreign Vessels

While section 955a expressly provides for criminal prosecution of all persons aboard U.S. and stateless vessels, the statute has no corresponding provision concerning foreign vessels.¹⁴² Although crewmembers aboard foreign vessels usually are foreign nationals,¹⁴³ section 955a(b) only prohibits U.S. citizens on board any vessel from engaging in acts of illegal possession, manufacture, or distribution of controlled substances.¹⁴⁴ Thus, on its face, the statute seems to preclude prosecution of foreign citizens traveling on foreign vessels on the high seas.¹⁴⁵

Despite the legislative omission, the Eleventh Circuit in dicta has conveyed conflicting signals about its willingness to apply section 955a to all persons aboard foreign vessels. In *Marino-Garcia*, for example, the court intimated that principles of international law would forbid the automatic application of the statute to all members of the crews of foreign vessels.¹⁴⁶ In *United States v. Glen-Archila*,¹⁴⁷ however, the court implied a different result. After reviewing a Coast Guard seizure of a foreign vessel under the prior federal statute that required proof of a nexus with the United States, the court upheld the conviction of cer-

141. *Id.*

142. *See supra* notes 98-100.

143. Interview with Andrew W. Anderson, *supra* note 26. *See also* 1979 HOUSE REPORT *supra* note 20, at 3.

144. *See supra* note 99.

145. In proceedings before the House of Representatives, one supporter of section 955a indicated that it was his belief that the United States could not exercise jurisdiction over foreign citizens on foreign flag vessels unless an intent to import into the United States could be shown or the flag state gives its concurrence. *See* 125 CONG. REC. 20,083 (statements of Congressman McCloskey). It is recognized that international law must give way when Congress expresses its clear intention to violate it. *See* *United States v. Howard-Arias*, 679 F.2d 363, 371-72; *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 (S.D. Fla. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1161, 1178-79 (E.D. Pa. 1980). *See also* RESTATEMENT, *supra* note 36, §§ 3(3), 145(1). The drafters of section 955a, however, expressed their intention to adhere to international law, not to disregard it. In view of this legislative commitment, the courts appear to have no legitimate authority over foreign citizens aboard foreign vessels on the high seas absent an internationally recognized basis for jurisdiction. *See* S. Rep., *supra* note 59, at 2; U.S. Code Cong. & Admin. News 1980, at 2785. *See also* 1979 HOUSE REPORT, *supra* note 20, at 11.

146. The court asserted that the "restrictions on the right to assert jurisdiction over foreign vessels on the high seas and the concomitant exceptions have no applicability in connection with stateless vessels." 679 F.2d at 1382 (emphasis added). *See supra* notes 136-38 and accompanying text.

147. 677 F.2d 809 (11th Cir. 1982) (British vessel, loaded with 30,000 pounds of marijuana, seized 20 miles off the Florida coast).

tain foreign members of the crew, in part because the seizure of the vessel within twenty miles of the Florida coast permitted the reasonable inference that the narcotics seized were intended for importation into the United States.¹⁴⁸ The court noted, however, that section 955a had eliminated the need to prove that the United States was the intended destination of the controlled substance.¹⁴⁹ Thus, the opinion could be read to imply that had the seizure taken place after the enactment of the new statute, proof of a nexus with the United States would not have been necessary to sustain the convictions.¹⁵⁰

A. *The Jurisdictional Problem*

The fundamental difficulty with the automatic application of section 955a to foreign crewmembers aboard foreign vessels is that international law provides no basis for the assertion of subject matter jurisdiction absent proof of a nexus between the criminal behavior and the United States. Unlike unprotected stateless vessels, foreign vessels on the open seas are governed by the laws of their flag states. Before a court can assert subject matter jurisdiction over crimes allegedly committed by foreign nationals on these vessels, one of the jurisdictional principles of international law should be satisfied.¹⁵¹ None of these principles apply automatically, however. The nationality principle authorizes nations to exert jurisdiction over their own citizens aboard any vessel and prevents U.S. citizens engaged in drug smuggling from eluding U.S. law by sailing on foreign vessels. Through its corollary, the law of the flag theory, all persons aboard U.S. vessels are subject to U.S. jurisdiction. The nationality principle is clearly inapplicable to foreign nationals aboard foreign vessels. Furthermore, unless proof of a connection between the foreign vessel and the United States can be established, neither the objective-territorial nor the protective principle can be used as a basis for jurisdiction.¹⁵²

148. *Id.* at 813-14.

149. *See id.* at 814 n.8.

150. *Id.* The seizure occurred in 1979. *Id.* at 812. Section 955a was enacted in 1980. *See supra* note 11.

151. *See supra* notes 30-55 and accompanying text.

152. Under the objective-territorial principle, the United States may assert jurisdiction over any vessel engaged in illegal activity intended to have an effect within its borders. *See supra* note 44 and accompanying text. While the protective principle does not require a criminal effect inside the United States, a potential threat to the security or governmental functions of the nation must exist before it may be applied. Thus, some nexus with the nation pressing prosecution is required. *See supra* note 45 and accompanying text. *See United States v. Egan*, 501 F. Supp. 1252 (S.D.N.Y. 1980) (unlawful importation of drugs represents a threat to the security of the United States). *See also* RESTATEMENT, *supra* note 36, § 33; Note, *supra* note 40, at 714.

High Seas Jurisdiction

B. *Applying the Universality Principle to Foreign Vessels*

Constrained by these clear limitations on three of the available jurisdictional principles, courts have looked to the fourth, the universality principle,¹⁵³ which requires no proof of a nexus. According to the court in *Marino-Garcia*, there is a growing consensus among nations to make drug trafficking a universally prohibited crime.¹⁵⁴ Although the United States favors such a classification,¹⁵⁵ it is unlikely that an international agreement can be achieved. For example, the 1961 Single Convention on Narcotic Drugs calls only for cooperation among nations to control their own citizens engaging in narcotics trafficking, but has yet to be approved by the number of countries required for its entry into force.¹⁵⁶ As a result, it is doubtful that a treaty attempting to establish drug smuggling as a universal crime would receive support at the present time.¹⁵⁷

C. *Lack of Notice to Foreign Citizens Aboard Foreign Vessels*

A collateral problem facing the courts concerns whether foreign citizens aboard foreign vessels in international waters can be held to notice of section 955a.¹⁵⁸ The *Marino-Garcia* court imputed constructive notice of U.S. law to crewmembers of stateless vessels, reasoning that because these vessels do not sail under the laws of a sovereign nation, they are subject to the jurisdiction of any nation.¹⁵⁹ Crewmembers should, therefore, be charged with knowledge of their exposure to other nations' maritime laws.¹⁶⁰ The same reasoning, however, cannot be applied to foreign citizens aboard foreign vessels on the high seas, because they sail under the protection of their flag state.¹⁶¹ Crews aboard these vessels are subject to their own country's laws under the national-

153. See *supra* notes 46-55 and accompanying text.

154. 679 F.2d at 1382 n.16.

155. See *infra* notes 164-66.

156. 679 F.2d at 1382 n.16.

157. One commentator summarized the drug smuggling problem in the following manner: "Suppression of international drug traffic is in many ways analogous to the pursuance of peace: all states profess it as a common goal, but there exist wide differences of opinion on the proper means of securing it." See Ficken, *supra* note 27, at 727.

158. 679 F.2d at 1384 n.19. See also *United States v. Newball*, 524 F. Supp. 715, 720 (E.D.N.Y. 1981) (court rejection of argument that § 955b(b) is so vague that it does not give fair notice to the ordinary person and thus violates the due process clause of the fifth amendment).

159. 679 F.2d at 1384 n.19.

160. *Id.*

161. Foreign crewmembers could argue that it is fundamentally unfair to presume that non-U.S. citizens on board a foreign vessel en route to a foreign country had notice of § 955a. See *id.*

ity principle.¹⁶² In accordance with international law, other nations must defer to the flag state's right of exclusive sovereignty over its vessels.¹⁶³ Consequently, any attempt by the United States to apply section 955a to foreign nationals aboard foreign vessels in extraterritorial waters would arguably violate international law.¹⁶⁴

Conclusion

Although section 955a remedied the loophole that existed under the Comprehensive Act, it is not a cure-all provision. Because the statute makes no reference to illegal acts by foreign citizens aboard foreign vessels, a literal reading places such persons beyond the scope of the Act.

Nevertheless, past law enforcement practices clearly indicate the government's desire to apprehend foreign smugglers carrying contraband aboard foreign vessels, in addition to those aboard U.S. and stateless vessels.¹⁶⁵ In an effort to further Congress' goal of halting drug importation, the Eleventh Circuit has implied that section 955a extends to all persons aboard foreign vessels, rather than just to U.S. citizens. This interpretation, however, fails to take into account the jurisdictional problems associated with foreign vessels on the high seas. The elimination of the nexus requirement under section 955a substantially altered the relationship between jurisdictional and substantive law as it pertained to foreign nationals aboard foreign vessels. Without evidence of a nexus, neither the objective-territorial nor the protective principle can be applied.¹⁶⁶ Consequently, the universality principle, which requires no proof of a nexus, appears to be the only viable basis for jurisdiction over foreign nationals engaging in drug trafficking aboard foreign vessels in violation of section 955a, unless prosecutors

162. See *supra* notes 39-42 and accompanying text. See also *supra* notes 30-32 and accompanying text.

163. See Convention on the High Seas, *supra* note 2, art. 6; UNCLOS III, *supra* note 2, art. 92.

164. See *id.* A violation of international law can be avoided when foreign nationals on board foreign vessels on the high seas are prosecuted under § 955a(a) if (1) a nexus to the United States can be shown, (2) the flag state expressly concurs, possibly through treaty, to the exercise of U.S. jurisdiction, or (3) drug trafficking is internationally recognized as a universal crime.

165. For examples of cases that involve federal prosecutions against foreigners on foreign vessels, see *United States v. Green*, 671 F.2d 46 (5th Cir. 1982); *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979); *United States v. Cadena*, 585 F.2d 1252 (5th Cir. 1978); *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967); *United States v. Streifel*, 507 F. Supp. 480 (S.D.N.Y. 1981).

166. See *supra* note 149.

High Seas Jurisdiction

are able to discharge the difficult burden of establishing a nexus between the narcotics and the United States.

Although past international conventions have called for global cooperation in suppressing the illegal drug trade,¹⁶⁷ no treaty yet has elevated narcotics smuggling to a universal crime. The recent concern over increases in drug smuggling may provoke the international community to classify trafficking as a universal offense.¹⁶⁸ Until worldwide agreement is reached,¹⁶⁹ U.S. courts face a dilemma: either they apply section 955a without a jurisdictional basis and in apparent violation of international law, or they allow the high seas to remain a sanctuary for foreign drug traffickers aboard foreign vessels.

167. See *supra* notes 52-55 and accompanying text. See also Convention for the Suppression of Illicit Traffic in Dangerous Drugs, open for signature June 26, 1936, 198 L.N.T.S. 299, 198 U.N.T.S. 299 (providing that countries make punishable the possession, distribution and importation of narcotics). The United States is not a party to this agreement. See TREATIES IN FORCE 315-18 (1981). For a discussion on international agreements involving drug trafficking, see generally Noll, *International Treaties and the Control of Drug Use and Abuse*, 6 CONTEMP. DRUG PROBLEMS 17 (1977).

168. The United States recently demonstrated its commitment to halt drug trafficking on the high seas by creating a special task force assigned to south Florida, using mainly Navy personnel and equipment, to aid the Coast Guard in its efforts. See Miami Herald, May 29, 1982, § A, at 1, col. 3.

169. UNCLOS III, like the Single Convention on Narcotic Drugs, see *supra* note 52, calls for international cooperation in the suppression of drug trafficking. See UNCLOS III, *supra* note 2, art. 108. The new convention, therefore, is also unlikely to cause the elevation of drug trafficking to the status of a universal crime. See *supra* notes 52-55 and accompanying text.

